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Joel D. Stafford

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NOTES

Consumer Protection: The Equal Credit Opportunity Act: Guarantors as Applicants—Did the Cost of a Violation Go Up?

Numerous hearings, investigations, and studies were performed in the early 1970s to inform Congress of, and to document, discriminatory credit practices that allegedly were prevalent across the nation. Most of the evidence presented centered on the inability of women to obtain credit on the same basis as men.¹ In response, the original version of the Equal Credit Opportunity Act (ECOA) was passed in 1974. It prohibited credit discrimination on the grounds of sex or marital status.² In this respect the drafters intended similarly situated creditworthy married and unmarried adults to be treated equally when applying for individual credit.³

For example, automatically requiring spousal cosignatures on all debt instruments was one common practice that precipitated the ECOA.⁴ Eradication of this kind of discrimination has been problematic because it involves measuring a fine line between equally important policy considerations.⁵ On

1. For an excellent discussion of these efforts, see Note, *Equal Credit: You Can Get There From Here—The Equal Credit Opportunity Act*, 52 N.D.L. REV. 381, 381-87 (1976).

2. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-91e (Supp. V 1975) [hereinafter ECOA or the Act] (amending Consumer Credit Protection Act, 15 U.S.C. § 1601-1693r (1970 & Supp. V 1975)).

3. See SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976, 1976 U.S. CODE CONG. & ADMIN. NEWS 403, 405 [hereinafter SENATE REPORT] (“[T]he Committee believes it must be established as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness.”).

4. See generally Jacobs, *An Introduction to the Equal Credit Opportunity Act for the Commercial Creditor*, 83 COM. L.J. 338 (1978). “[I]t is generally the practice of banks to require the personal guarantees of the principals of close corporations and similar small business borrowers. Further, it has been the practice of many banks to require the spouses of those principals to join in such guaranties.” *Id.* at 344. See also Geary, *Equal Credit Opportunity—An Analysis of Regulation B*, 31 BUS. LAW. 1641 (1976). It is a common practice in the credit industry to ask every married person who applies for credit to obtain the signature of his or her spouse. The capacity in which the spouse signs and the creditor’s motivation for requiring the signature may vary from case to case. *Id.* at 1652.

5. Rohner, *Equal Credit Opportunity Act*, 34 BUS. LAW. 1423 (1979). Limitations on freedom to require a spouse’s signature are troublesome to creditors; and they are among the most frequent violations detected in bank examinations, according to Federal Reserve Board reports. *Id.* at 1431. See also Interagency Policy Statement of Financial Institutions Examinations Council, 46 Fed. Reg. 56,500 (1981). In a document setting forth the general policies of the four principal enforcing agencies of the ECOA, creditors requiring cosigners and guarantors in violation of Regulation B was cited as one of five “serious” violations of the ECOA. *Id.* at 56,501.

one hand, creditworthy married persons should be entitled to establish individual credit. On the other, creditors should be allowed to take reasonable precautions necessary to protect their recourse to assets on which the credit extension is premised. Such precautions include obtaining whatever signatures are necessary to allow the creditor to reach jointly owned property considered in the credit evaluation.

State laws are often unclear as to when a signature is necessary to allow a creditor to reach jointly owned property or to establish a valid security interest in such property.⁶ As a result, rather than face the problem of ascertaining when a signature was necessary under state law, creditors simply required spousal cosignatures on all debt instruments. Hence, married persons were only offered joint credit, and the individual credit offered to similarly situated single persons was unavailable to married persons.

Although womens' rights groups considered the 1974 Act a significant breakthrough, evidence of discrimination in credit was not limited to sex and marital status.⁷ Therefore, in 1976 Congress expanded the Act to create a comprehensive credit discrimination statute.⁸ The present statutory scope of the Equal Credit Opportunity Act is very broad. It prohibits any creditor

6. For an excellent general analysis of the cosignature rules, see Taylor, *The Equal Credit Opportunity Act's Spousal Co-signature Rules: Suretyship Contracts in Separate Property States*, 48 ALB. L. REV. 382 (1984). Regulation B requires unsecured creditors to consider factors such as susceptibility to attachment, execution, severance, and partition that may affect the value of the applicant's interest in the property to the creditor. For secured credit, creditors must determine what portion of the property the applicant is able, under state law, to transfer without the signature of a spouse or other person. *Id.* at 391.

For an analysis of the potential problems under Oklahoma law, see Murphy, *Prohibited Discrimination in the Granting of Credit: The Equal Credit Opportunity Act and Regulation B*, in UNIV. OF OKLA. CREDIT L. INST. 17-19 (1976). For example, in Oklahoma, joint industry property laws (84 OKLA. STAT. §§ 44, 213 (1981)) give a married couple's property some attributes of community property. Generally, the joint industry concept does not give a spouse a vested interest in the property acquired during coverture, but rather a contingent one activated by death or divorce. Nevertheless, case law recalling property transferred by one spouse may give rise to an argument that it is reasonable to require both signatures in every instance where joint property is involved. See *Sanditen v. Sanditen*, 496 P.2d 365 (Okla. 1972). Less debatable is 16 OKLA. STAT. § 4 (1981), which dictates that the signature of both spouses is necessary to create a valid lien or pass clear title to a homestead in most circumstances. As another illustration, the facts surrounding the acquisition of property by a married couple may indicate that both have an interest therein so as to necessitate both signatures. See *Gilles v. Norman Plumbing Supply Co.*, 549 P.2d 1351, 1353 (Okla. Ct. App. 1975).

Regarding Oklahoma property laws, see generally Reynolds, *Co-ownership of Property in Oklahoma*, 27 OKLA. L. REV. 585 (1974); Lilly, *Oklahoma's Troublesome Coverture Property Concept*, 11 TULSA L.J. 1 (1975); Note, *Personal Property: Joint Accounts with Rights of Survivorship*, 20 OKLA. L. REV. 462 (1967).

7. See Maltz & Miller, *The Equal Credit Opportunity Act and Regulation B*, 31 OKLA. L. REV. 1, 2 n.6 (1978) and authorities cited therein.

8. Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-91e (1982). The Act is implemented by regulation, the current version of which is Regulation B. 50 Fed. Reg. 48,010 (1985) (codified at 12 C.F.R. § 202 (1986)).

from discriminating against any applicant on a prohibited basis in a credit transaction.⁹

In drafting the ECOA, Congress created a framework reflecting its purpose of banning discriminatory credit practices. Accordingly, the Act does not address many specific problems, including when a creditor may require a spousal cosignature on debt. However, Congress delegated substantive rule-making authority to the Federal Reserve Board and empowered it to prescribe regulations necessary to enforce the purpose of the Act.¹⁰ Old Regulation B,¹¹ promulgated in 1975 to implement the Act, established specific guidelines intended to facilitate compliance with all phases of the Act. With respect to cosignatures, both Old and New Regulation B generally prohibit creditors from requiring cosignatures on any credit instrument if the applicant otherwise qualifies under the creditor's standards of creditworthiness.¹²

The cosignature rules of Old Regulation B have been criticized for not providing a meaningful guideline to creditors.¹³ A substantial amount of this criticism centered on the apparent lack of remedy provided by Old Regulation B when a creditor improperly required a spousal guarantee of debt.¹⁴ Under the literal language of the regulation, guarantors and sureties had no standing to sue under the ECOA. As a result of that criticism, New Regulation B in 1985 specifically gave guarantors and sureties standing to sue.

9. 15 U.S.C. § 1691(a) (1982). The Act prohibits discrimination on the basis of race, color, religion, national origin, sex or marital status, age, source of income, or because the applicant has exercised a right under the Consumer Credit Protection Act.

10. *Id.* § 1691(c) (the Board shall prescribe regulations to carry out the purposes of this title). Congress empowered twelve federal agencies, including the Federal Reserve Board, to enforce the Act administratively.

11. "Original Regulation B," 12 C.F.R. § 202 (1975), was superseded when coverage of the Act was expanded. That revised regulation, 12 C.F.R. § 202 (1977), will be cited as "Old Regulation B." The regulation was amended in 1985 to, *inter alia*, include guarantors within the definition of applicant. 12 C.F.R. § 202 and commentary (1986) [hereinafter Regulation B or New Regulation B]. See *infra* notes 64-70 and accompanying text.

12. 12 C.F.R. § 202.7(d)(1) (1986) reads in pertinent part: "Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested."

13. See Taylor, *supra* note 6, at 383-84 ("The ECOA regulatory provisions . . . have often been criticized for their failure to provide clear and meaningful guidelines to creditors. Section 202.7(d) has been dubbed 'the most controversial provision of Regulation B'").

14. See Geary, *Equal Credit Opportunity*, 38 Bus. Law. 1287, 1290-91 (1983). The article criticized *Morse v. Mutual Fed. Sav. & Loan*, 536 F. Supp. 1271 (D. Mass. 1982), which denied a guarantor recovery under the Act. The author reasoned that if the spouse were required to sign as a guarantor, the credit would be joint, not individual, and this would be discrimination on the basis of marital status. Rather than faulting Regulation B, the article criticized the rationale of the court. Nevertheless, remedy under the Act for guarantors was the ultimate objective.

"Prohibiting creditors from requiring spousal co-signatures without providing a remedy for one whose signature has been wrongfully obtained obviously weakens a link in the ECOA enforcement chain. Creditors are less likely to comply with a regulatory provision that can be violated with impunity." Taylor, *supra* note 6, at 388.

This note examines the validity and substance of the criticisms of Old Regulation B with respect to guarantors. Although the criticism had merit in the business credit context, this note contends that in the typical consumer context the criticism was unwarranted. Moreover, it examines the extent to which New Regulation B resolves the guarantor problem. Finally, the note considers remedies available under both the Act and applicable Oklahoma law when a spousal guarantee is improperly required.

Spousal Guarantees of Debt Under Old Regulation B

The Mechanics of the Regulation B Cosignature Rules

As a general rule under Regulation B, a creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.¹⁵ The definitions of the general rule's key elements are as broadly stated as the rule itself, reflecting the comprehensive nature of the ECOA. For example, a credit transaction includes every aspect of an applicant's dealings with a creditor regarding an application for, or extension of, credit.¹⁶ Moreover, the term "applicant" refers not only to natural persons but also to organizations, such as corporations and partnerships.¹⁷ Finally, to discriminate means to treat an applicant less favorably than other applicants.¹⁸ The definition is intentionally broad to allow case law to determine the scope of prohibited discrimination consistent with prior antidiscrimination legislation.¹⁹

Under Old Regulation B, "applicant" was defined as any person who requested or who had received an extension of credit. Although the definition included persons who were contractually liable regarding an extension of credit, it excluded guarantors, sureties, endorsers, and similar parties.²⁰ A proposed version of the regulation included in its definition of applicant persons who were contractually liable but made no reference to guarantors or sureties, specifically intending to extend the protection of the ECOA to those

15. 12 C.F.R. § 202.4 (1986).

16. *Id.* § 202.2(m).

17. *Id.* § 202.2(x) reads: "Person means a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association."

18. *Id.* § 202.2(n).

19. Two proposed bills included definitions of "discriminate." H.R. 14856, defined "discriminate" as "to make any invidious distinction." H.R. 14908, defined "discriminate" as "to take any arbitrary action based on any characteristic attributable to the sex or marital status of an applicant." *Hearings Before the Subcomm. on Consumer Affairs of the Comm. on Banking & Currency on H.R. 14856 and H.R. 14908*, 93d Cong., 2d Sess., pt. 1, 3, 17 (1974). However, Congress intended case law to develop a definition consistent with prior legislation; therefore, no definition was included in the final Act.

20. 12 C.F.R. § 202.2(e) (1977) (Old Regulation B) reads: "Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who may be contractually liable regarding an extension of credit, other than a guarantor, surety, endorser, or similar party."

persons.²¹ However, in response to credit industry concerns, the final version specifically excluded guarantors.²²

Section 202.7(d) of Regulation B specifically addresses the question of when a creditor's requirement of both spouses' signatures on a credit instrument is discriminatory. In general, a creditor may not require the signature of an applicant's spouse on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness.²³ The purpose of this provision is to ensure that individual credit is, in reality, available to a credit-worthy married applicant.²⁴

However, if the personal liability of an additional party is necessary to support an extension of credit, the creditor may request an additional party to cosign or guarantee the debt. Although the applicant's spouse may serve as the additional party, the creditor may not require that the applicant's spouse be the additional party.²⁵ Likewise, when a principal or stockholder of a corporation is required to become personally liable for corporate credit, the creditor may not require that the principal's spouse become an additional guarantor.²⁶ In short, the practice of automatically requiring an applicant's

21. See 41 Fed. Reg. 29,870, 29,871, 29,878 (1976).

22. See 41 Fed. Reg. 49,123, 49,124, 49,132 (1976); 42 Fed. Reg. 1,242, 1,243, 1,252 (1977).

23. 12 C.F.R. § 202.7(d)(1) (1986) (New Regulation B).

But cf. *United States v. ITT Consumer Fin. Corp.*, 816 F.2d 487, 492 (9th Cir. 1987) (in community property state, if applicant is not creditworthy, finance company may require spouse or other person to cosign debt); *Miller v. Elegant Junk*, 616 F. Supp. 551, 553-54 (S.D. W. Va. 1985) (totally disregarding section 202.7(d)(5), court held that if applicant is not creditworthy, finance company may require spouse to cosign debt).

24. See Maltz & Miller, *supra* note 7, at 34 n.162. See also *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982).

25. 12 C.F.R. § 202.7(d)(5) (1986) reads in pertinent part:

If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request a cosigner, guarantor, or the like. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

26. See Official Commentary, 12 C.F.R. § 202.7(d)(6)-1 (1986). Prior to amendment of Regulation B in 1985, the Comptroller of the Currency and Federal Reserve Board issued letters interpreting the provisions of Regulation B. These letters were superseded by the Official Commentary that accompanied the 1985 amendment to Regulation B. Nevertheless, the letters are a useful tool for ascertaining both the evolution of Regulation B and the intent of the Federal Reserve Board.

Compare Comptroller of the Currency Interpretive Letter, Sept. 14, 1977, *reprinted in* 5 Consumer Cred. Guide (CCH) ¶ 42,096 (1977), with Federal Reserve Board Letter No. 4, Mar. 1, 1977, *reprinted in* 5 Consumer Cred. Guide (CCH) ¶ 42,083 (1977) [hereinafter Letters]. In regard to requiring the cosignature of the principal's spouse on corporate obligations, the creditor cannot require the additional signature if the individual principal is creditworthy without reference to any jointly owned assets or to the spouse's income or property. If personal liability of an additional party is necessary to satisfy the creditor's standards of creditworthiness, then the signature of some other party may be required; but the bank may not limit the choice of cosigner to the applicant's spouse.

spouse to guarantee debt clearly violates Regulation B and also is considered to be a serious violation of the ECOA.²⁷ Nevertheless, exclusion of guarantors from the definition of "applicant" apparently left this serious violation without a remedy.

The Guarantor Problem: Lack of Standing to Sue

One of the often cited inadequacies of Old Regulation B, as to debtor protection, dealt with the lack of remedy available to a spouse who was required to cosign or guarantee debt in violation of Regulation B.²⁸ To illustrate, assume a creditor wrongfully requires a spousal guarantee. Thereafter, the applicant spouse defaults on the note and the creditor sues the guarantor spouse. As discussed above, this scenario clearly violates the cosignature rules of Regulation B. However, the guarantor is not an "applicant" within the meaning of Regulation B; therefore, the guarantor has no standing under the ECOA to raise an equitable defense to liability or counterclaim for damages.

Critics contended that standing to bring a private action should be extended to guarantors and cosigners for three reasons. First, if the spouse were required to sign as a guarantor, the credit granted would be joint credit rather than individual credit. The denial of individual credit to a creditworthy married person violates Regulation B, section 202.7(d) and constitutes discrimination on the basis of marital status, actionable by either spouse.²⁹ Second, the applicant spouse, having already received credit, has less incentive to bring suit than the cosigning spouse. Moreover, it is the cosigning spouse who may in fact become harmed if later forced to repay the debt of the defaulting applicant spouse.³⁰ Third, prohibiting creditors from requiring spousal guarantees without providing a remedy weakens a link in the ECOA enforcement chain. Creditors are less likely to comply with Regulation B if there is no penalty for a violation.³¹ Also, a broader-based applicant pool might enhance enforcement of Regulation B.³² According to the critics, by excluding guarantors and cosigners from the Old Regulation B definition of applicant, the Federal Reserve Board denied ECOA protection to a class of persons whom the Act intended to protect.

Nevertheless, courts consistently applied the Old Regulation B definition of applicant to deny guarantors relief under the Act.³³ The textbook example

27. *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 n.2 (9th Cir. 1982) (construing FRB Policy Statement and Guidelines, 50 U.S.L.W. 2233 (Oct. 7, 1981)).

28. See generally *Taylor*, *supra* note 6; *Geary*, *supra* note 14.

29. See *Geary*, *supra* note 14, at 1291.

30. Memorandum to Consumer Advisory Council Members from C.A.C. Regulation B Committee (Oct. 18, 1984) [hereinafter Memorandum].

31. See *Taylor*, *supra* note 6, at 388.

32. Memorandum, *supra* note 30.

33. See *infra* notes 34-53 and accompanying text. *But cf. In Re Remington*, 19 Bankr. 718 (D. Colo. 1982) (court followed a disputed line of Truth-in-Lending cases to hold that the statute

is *Morse v. Mutual Federal Savings & Loan Association*.³⁴ The Morses owned a home that was jointly mortgaged to Mutual Federal. As an accommodation to a customer, Mutual Federal would periodically issue Mr. Morse a cashier's check in exchange for his business check drawn on another bank, effectively granting him an unsecured loan. When several of Mr. Morse's business checks given to Mutual Federal were returned unpaid, Mutual Federal improperly added the amount to the couple's joint mortgage. Thereafter, Mutual Federal persuaded Mr. Morse to sign a note for the amount of the returned checks, to which Mrs. Morse added her signature.³⁵

When Mutual Federal instituted foreclosure proceedings on the note, the Morses sued for damages. Mrs. Morse alleged that requiring her signature on the note violated the cosignature rules of Regulation B. She contended that the bank discriminated against her on the basis of her marital status by requiring her to sign the note.³⁶ The court held that Mrs. Morse signed the note as a guarantor; therefore, she was not an aggrieved "applicant" and not entitled to bring a private action under the ECOA. The debt was Mr. Morse's, and the note was an extension or renewal of credit to him.³⁷ Therefore, only Mr. Morse was an "applicant" within the meaning of Old Regulation B. The court concluded that although the note did not establish an enforceable lien on the Morse's home, the note itself was valid and Mrs. Morse had not been improperly required to sign it.³⁸ However, the court reasoned that if Mrs. Morse's signature had violated Regulation B, the discrimination was against Mr. Morse because he was unable to secure credit without his wife's signature.³⁹

Morse has been sharply criticized as a failure by the court to understand the rules relating to signatures of an applicant's spouse. The critics contend that by requiring Mrs. Morse's signature on the note, the credit granted was joint credit rather than individual credit; therefore, Mrs. Morse, being a joint applicant, should be entitled to bring a private action for a violation of Regulation B.⁴⁰ Despite this criticism, *Morse's* interpretation of Old Regulation B makes perfect sense in terms of the intended purpose of the ECOA.⁴¹

Congress intended that no credit applicant be denied individual credit on the basis of any characteristic other than creditworthiness.⁴² Although Mrs.

of limitations does not apply to defenses raised in recoupment by a guarantor under the ECOA and, thus, in effect gave a guarantor standing to sue).

34. 536 F. Supp. 1271 (D. Mass. 1982).

35. *Id.* at 1275.

36. *Id.* at 1274-75.

37. *Id.* at 1278.

38. *Id.* at 1276.

39. *Id.* at 1278.

40. See Geary, *supra* note 14, at 1291 n.15.

41. See SENATE REPORT, *supra* note 3. Mr. Morse was denied individual credit on a basis having nothing to do with his creditworthiness—marital status. Mrs. Morse was not denied credit at all, therefore, there was no discrimination against her.

42. See SENATE REPORT, *supra* note 3, at 405.

Morse became obligated on her husband's note, she was never an applicant and was not denied individual credit based on her marital status. Any other outcome would be inconsistent with the Federal Reserve Board's intent. The Board amended a proposed draft of the regulation which had extended protection to guarantors and cosigners, specifically excluding these parties from the definition of "applicant."⁴³

In contrast, the interpretation of Regulation B adopted by *Morse* is not only consistent with the intent of the Federal Reserve Board, but it does not leave the debtors without a remedy. Although *Morse* held that Mrs. Morse had not been wrongfully required to sign the note, for purposes of illustration, assume her signature violated Regulation B. In that case, nothing in Regulation B would prevent Mr. Morse from seeking redress under the ECOA. He was denied individual credit on the basis of marital status. Unlike his wife, Mr. Morse was an "applicant" within the meaning of Regulation B because he received an extension of credit from Mutual Federal.

As an aggrieved credit applicant, Mr. Morse could bring a private action either for damages or equitable relief under the ECOA. However, Mr. Morse should not be allowed to avoid payment of his note—it was a valid and proper obligation. The only harm he suffered was being denied individual credit with his choice of cosigner. Similarly, money damages would not properly compensate Mr. Morse for the type of harm he suffered. The logical remedy would be to restore him to a nondiscriminatory position by compelling Mutual Federal to release Mrs. Morse as a guarantor.⁴⁴ Indeed, the outcome under this rationale would be no different than if the guarantor were allowed to raise the ECOA as a defense to liability. By limiting the right of action to the person who was denied individual credit, this approach is preferable because it is consistent with the intent of the ECOA.⁴⁵ In sum, at least in a *Morse*-type scenario, the criticism of Old Regulation B may have been unfounded.

On the other hand, the criticism of Old Regulation B had substantial merit in a business credit context. It has traditionally been a common practice for banks to require the personal guarantees of the stockholders of small corporate borrowers. Often the stockholder's spouse is automatically required to guarantee the debt as well.⁴⁶ Requiring a stockholder to guarantee a corporate debt is not a violation of Regulation B. However, automatically requiring the stockholder's spouse to also sign a personal guarantee is prohibited by

43. See *supra* notes 21 and 22.

44. This was the result recommended for this type of violation by the Federal Reserve Board in its ECOA Enforcement Guide. The Guide was published under a press release of the examination council on September 14, 1981. However, the Enforcement Guide has been criticized because it implies that a cosigning spouse should remain liable until a substitute cosigner is obtained, if one is necessary for creditworthiness. See generally Rice, *Credit Discrimination*, 37 BUS. LAW. 1137 (1982); Taylor, *supra* note 6, at 389-90.

45. See SENATE REPORT, *supra* note 3, at 405.

46. Jacobs, *supra* note 4, at 344.

Regulation B.⁴⁷ In this instance, both the stockholder and the spouse are guarantors. Under the literal language of Regulation B, both the stockholder and the spouse are excluded from the definition of “applicant.” Accordingly, *Delta Diversified, Inc. v. Citizens & Southern National Bank* interpreted the regulations to deny a stockholder, acting as a guarantor of corporate debt, standing to sue under the ECOA.⁴⁸

In *Delta Diversified* three principal stockholders were required to personally guarantee a series of corporate loans.⁴⁹ When the first loan was closed, only two of the stockholders were married. The bank required the two married stockholders’ wives to personally guarantee the loan but did not require an additional guarantee from the unmarried stockholder. The third stockholder married prior to closing the second loan. Accordingly, all three wives were required to sign guarantees of the second loan.⁵⁰ When the company defaulted on its notes, the bank sued the individuals on their guarantees. The stockholders and their wives attempted to interpose the ECOA as a defense to the bank’s claims. The court held that neither the stockholders nor their wives were “applicants” as defined by Old Regulation B.⁵¹ Therefore, they had no standing to raise a violation of Regulation B as a defense to payment of the guarantee.

This result was inconsistent with the Federal Reserve Board letters interpreting the cosignature rules of Old Regulation B. According to those letters, requiring a stockholder’s spouse to sign a guarantee was a violation of the cosignature rules.⁵² However, in the corporate context the rationale of the letters breaks down because neither the stockholder nor the spouse was ever an “applicant.” The “applicant,” for purposes of Old Regulation B, was the corporation in *Delta Diversified*.⁵³

The problem in *Delta Diversified* was that the “applicant” was not discriminated against within the meaning of Regulation B. The corporation was not denied individual credit because there is nothing discriminatory about requiring the owner to personally guarantee corporate debt. If anyone was discriminated against in *Delta Diversified*, it was the stockholder whose spouse was required to sign a personal guarantee; he was denied the opportunity to individually guarantee his corporate debt. However, by distinguishing between the stockholder in his role as corporate representative and his role as owner, he was never technically an “applicant” within the

47. See Letters, *supra* note 26, at ¶¶ 42,083, 42,096.

48. 171 Ga. App. 625, 320 S.E.2d 767, 771 (1984).

49. *Id.* at 769.

50. *Id.* at 771.

51. *Id.*

52. See Letters, *supra* note 26, at ¶¶ 42,083, 42,096.

53. 171 Ga. App. 625, 320 S.E.2d at 771. *Delta Diversified* implied that the proper applicant was the corporation by stating that neither the stockholder nor his spouse were the proper applicant. See also *Bank of Am. Nat’l Tr. & Sav. Ass’n v. Hotel Rittenhouse Ass’n*, 595 F. Supp. 800, 808 (E.D. Pa. 1984) (the partnership, and not the general partner who personally guaranteed partnership debt, was the applicant for purposes of Regulation B).

meaning of Old Regulation B. Therefore, he had no standing to sue under the ECOA.

The Meadors Problem: Can a Creditor "Require" a Spousal Guarantee by Circumstances?

With respect to guarantors, most of the criticism of Old Regulation B centered on the lack of remedy for improperly required guarantees illustrated by *Morse* and *Delta Diversified*. However, lack of standing to sue for a clear violation of Regulation B has not been the only barrier to recovery by guarantors.

In order to recover under the ECOA, not only must the guarantor be an "applicant," the creditor's conduct must also violate Regulation B. With respect to spousal guarantees, the regulation is straightforward and has not generated a great deal of criticism. Regulation B, section 202.7(d)(5) provides that if the personal liability of an additional party is necessary to support an extension of credit, the creditor may request a cosigner or guarantor. The applicant's spouse may serve as the guarantor, but the creditor may not *require* the spouse to be the guarantor.⁵⁴ In 1985, *United States v. Meadors* drew a distinction between spousal guarantees required by the creditor and spousal guarantees allowed, but not required, by the creditor.⁵⁵

In *Meadors*, three principals of a lumber company applied for a Small Business Administration loan. Two of the principals were married and their spouses joined in the application. Mr. Meadors, the third principal, married between the time of application and closing of the loan. At closing, all six, including Meadors' spouse, signed personal guarantees. Although a representative of the agent bank was present at closing, he neither requested that Mrs. Meadors sign the guarantee nor protested when she in fact signed it.⁵⁶

Although the court denied Mrs. Meadors an ECOA defense, it did not base its decision on the definition of "applicant" in Old Regulation B. *Meadors* interpreted the language of the regulation to prohibit the act of "requiring" a spouse's signature. Because Mrs. Meadors acted voluntarily, the ECOA was not implicated.⁵⁷ Therefore, under *Meadors*, only an affirmative

54. See 12 C.F.R. § 202.7(d)(5)(1986). See also *supra* note 25.

55. 753 F.2d 590 (7th Cir. 1985).

56. *Id.* at 591. Although the court noted that the guarantee form only provided places for signatures of the intended guarantors, that would not prevent Mrs. Meadors from misunderstanding whether her signature was required. First, she was not married when the original loan application was made. Therefore, the SBA could not have known she existed when the form was prepared. Second, another principal's wife had made herself available to sign a guarantee, but was not provided a place to sign on the form. She signed the guarantee as well. The fact that both of the other principals' wives, who had been involved in the application process, signed the form, could certainly have created a perception to Mrs. Meadors that she was obligated to sign as well.

57. "[W]hen the creditor does require the signature of any creditworthy additional party, and the spouse accordingly elects to sign. . . , he or she cannot later raise the ECOA as a defense, since [the] signature is valid according to the Regulations." *Id.* at 593.

requirement of a spousal guarantee violates Regulation B. If the creditor merely allows the spouse to sign a guarantee, no violation exists.

Although this conclusion may be consistent with the strict language of the cosignature rules, when applied to the facts in *Meadors* it does not seem consistent with the intent of Regulation B.⁵⁸ A primary purpose of Regulation B is to promote the availability of credit by prohibiting creditor practices that discriminate on the basis of marital status.⁵⁹ Even the term “discriminate” is broadly defined as simply treating an applicant less favorably than other applicants.⁶⁰

Granted, neither the Act nor Regulation B imposes a general duty upon the creditor to advise the debtor or the debtor’s spouse of their respective rights under the cosignature rules. In some instances the spouse would want to sign even if advised that a spousal cosignature was not required.⁶¹ On the other hand, in other circumstances a creditor should recognize that an applicant misunderstands whose signatures are in fact required on the debt instrument.

If the creditor does nothing to prevent the effectuation of an obvious misunderstanding, allowing an applicant’s spouse to “voluntarily” sign a guarantee arguably should be considered a violation of Regulation B’s general rule against discrimination. If that seems to go too far, consider the circumstances which give rise to this asserted duty to advise. The creditor obtained the spouse’s signature even though the applicant was creditworthy without it. This fact alone establishes a *prima facie* violation of Regulation B.⁶² The creditor’s defense is that the signature was voluntary. Without giving the advice, can the creditor be sure the defense can be established if the guarantor testifies he or she, due to the circumstances, thought the signature was required? In short, cannot a creditor “require” by circumstances?

A limited duty to advise is not foreign to the Regulation B cosignature rules. As to secured credit, a spouse may only be asked to sign an integrated instrument that makes clear, by means of a legend, that the spouse’s signature is only required to grant a security interest and that signing the instrument does not impose personal liability.⁶³ Including the legend in an inte-

58. See SENATE REPORT, *supra* note 3, at 405.

59. 12 C.F.R. § 202.1(b) (1986).

60. *Id.* § 202.2(n).

61. Federal Reserve Board Letter No. 2, Apr. 20, 1976, *reprinted in* 5 Consumer Cred. Guide (CCH) ¶ 42,081 (1976). Creditors may not as a matter of course require the signature of a nonapplicant spouse on a note. However, the spouse may sign the note voluntarily to “reap the benefits of a credit history.”

62. See 12 C.F.R. §§ 202.1(b), 202(n) (1986). The purpose of Regulation B is to promote the availability of credit to creditworthy applicants without regard to marital status. If a creditworthy applicant’s spouse has signed a personal guarantee, it at least appears the applicant has been treated less favorably than other applicants.

63. Official Commentary, 12 C.F.R. § 202.7(d)(4)-3 (1986).

See also Comptroller of the Currency Interpretive Letter, Oct. 27, 1977, *reprinted in* 5 Consumer Cred. Guide (CCH) ¶ 42,099 (1977). A creditor may require the signature of co-owners only on the documents necessary under state law to make the property available in case of default. The creditor may not routinely require co-owners to sign and become personally liable

grated instrument is a duty; it is a violation of Regulation B not to include it. Because a similar regulatory duty to advise does not exist with respect to spousal guarantees, arguably no duty exists in that case. However, it appears the Federal Reserve Board's intent, by requiring a legend on integrated instruments, was to clarify the debtor's rights in a circumstance prone to misunderstanding. The propensity for misunderstanding inherent in an integrated debt instrument is analogous to the propensity for misunderstanding inherent in a *Meadors*-type situation. Therefore, the proposition that a creditor can "require" a spousal guarantee by circumstances, and thereby violate Regulation B, does not seem inconsistent with the Federal Reserve Board's demonstrated intent to prevent such misunderstandings.

Particularly in a small closely held business, when the principal or stockholder is required to sign a personal guarantee, an uninformed spouse may feel an unwarranted duty to sign as well. Although an applicant's spouse might want to sign a note voluntarily to reap the benefits of a credit history, that same motivation probably does not exist with personal guarantees. It seems very unlikely that Mrs. Meadors would have signed a personal guarantee had she been advised that her signature was not required. Also, the circumstances likely created a perception in Mrs. Meadors that she had no choice but to sign a guarantee; that is, she was "required" by the circumstances to sign. The creditor must have been aware of Mrs. Meador's mistaken perception because every guarantor on the loan was an applicant except Mrs. Meadors. By remaining silent in a situation that created a perceived duty to sign, the creditor "required" Mrs. Meador's signature by his conduct and thus treated her less favorably than other applicants, violating Regulation B, section 202.7(d).

Amendment to Regulation B: An Incomplete Solution

There is no specific evidence of congressional intent to extend ECOA protection to guarantors.⁶⁴ However, Congress intended that creditors comply with Regulation B and that credit be granted in a nondiscriminatory manner. In 1984 the Board of Governors of the Federal Reserve System began formally considering an amendment to Regulation B.⁶⁵ In 1985 the Federal

on the promissory note, however, since there is a distinction between notes and security agreements.

See generally Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982); Comptroller of the Currency Interpretive Letter, Sept. 14, 1977, *reprinted in* 5 Consumer Cred. Guide (CCH) ¶ 42,096 (1977); Comptroller of the Currency Interpretive Letter, Oct. 27, 1977, *reprinted in* 5 Consumer Cred. Guide (CCH) ¶ 42,100 (1977).

64. *See* Senate Report, *supra* note 3, at 406. Congress stated that the bill was intended to prevent various kinds of credit discrimination that had occurred in the past and anticipate and prevent discriminatory practices in the future. However, spousal guarantees are never mentioned in the Committee Reports or the Act itself.

65. Memorandum, *supra* note 30. The memorandum discussed the potential effects of an amendment to Regulation B which would give guarantors standing to sue. A broader-based applicant pool might enhance enforcement of Regulation B. However, it might also cause creditors

Reserve Board published a proposed amendment to the regulation that changed the definition of applicant to include guarantors, endorsers, and sureties for all aspects of Regulation B.⁶⁶

However, credit industry commentators expressed concern that the unlimited inclusion of guarantors in the definition of "applicant" might subject creditors to a risk of liability for technical violations of Regulation B provisions that were irrelevant to guarantors.⁶⁷ Therefore, the final version of the definition was modified to include guarantors only for purposes of the cosignature rules.

New Regulation B defines "applicant" as any person who requests or who has received an extension of credit, including one who may become contractually liable regarding an extension of credit. For purposes of section 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.⁶⁸ Thus, as of October 1, 1986,⁶⁹ a guarantor has regulatory standing to sue for violations of the Regulation B cosignature rules. Consequently, this revision will change the outcome in future cases similar to *Morse* and will provide a useful vehicle for recovery in cases like *Delta Diversified*.

Although no cases have yet interpreted the amendment, it seems the critics' concerns are quelled, at least with respect to the standing to sue problem. However, the amendment will have no impact on the *Meadors* problem. The Regulation B language that was critical to the outcome of *Meadors* was the cosignature rule that prohibited a creditor from "requiring" an applicant's spouse to cosign or guarantee debt. That language remained unchanged in the amendment. Nevertheless, the *Meadors* problem is not one that is dependent on an amendment to Regulation B for resolution.

The real problem in *Meadors* centered on the appropriate scope of the term "discrimination." In certain business credit circumstances, particularly those involving small family businesses, the spouse may perceive a duty or compulsion to sign. Arguably, in those instances where the circumstances are prone to misunderstanding, a creditor may "require" the spouse's guarantee

to reduce their exposure by granting fewer cosignature loans. Moreover, the memorandum recognized that there is no indication Congress intended to grant Regulation B remedies to guarantors.

66. 50 Fed. Reg. 10,890, 10,900 (1985). The proposed amendment to Regulation B included guarantors, sureties, endorsers, and similar parties within the definition of "applicant" for all purposes. This would bring guarantors not only within the cosignature provisions but also within the reporting and notification provisions.

67. 50 Fed. Reg. 48,020, 48,027 (1985). Commentators believed that the unlimited inclusion of guarantors in the definition might subject creditors to a risk of liability for technical violations of various provisions of the regulations.

68. 12 C.F.R. § 202.2(e) (1986) reads: "Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers and similar parties."

69. 12 C.F.R. § 202.2(e) (1986). The amended regulation became effective December 16, 1985. However, creditors had the option to continue complying with the old regulation until October 1, 1986.

and violate Regulation B simply by remaining silent.⁷⁰ Consequently, the amendment neither resolved nor delayed the resolution of the *Meadors* problem because the proper scope of the term "discrimination" is open to judicial interpretation.

The critical issue raised by the amendment to Regulation B is its effect on the price of, or remedy for, a violation of Regulation B. In this regard, by including guarantors within the definition of "applicant," the amendment may have created a new problem. If both the guarantor and the original applicant are "applicants" within the meaning of Regulation B, the ECOA appears to allow both "applicants" to recover compensatory and punitive damages for a single violation. The second part of this note will examine that potential problem and suggest a resolution that is both logical and consistent with the Federal Reserve Board's intent. Finally, Oklahoma has a credit discrimination statute that is basically patterned after the ECOA. The note will examine the virtually untapped additional source of relief that is available under the Oklahoma law.

Remedies under New Regulation B and Oklahoma Law

Does "Multiple Applicants" Mean Multiple Recoveries?

The ECOA affords aggrieved applicants a private cause of action for violations of Regulation B. A court may award actual damages,⁷¹ punitive damages,⁷² equitable and declaratory relief,⁷³ and litigation costs, including attorneys' fees.⁷⁴ The recent amendment to Regulation B did not change any civil remedy already available to an aggrieved applicant.

However, by including guarantors and sureties within the definition of applicant, the new amendment is certain to impact future litigation. To illustrate, suppose the owner of a small corporation applies for credit at a bank. The bank grants the credit on condition that the owner and the owner's

70. See *supra* notes 18-19 and accompanying text.

71. 15 U.S.C. § 1691e(a) (1982) reads in pertinent part: "Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class."

72. 15 U.S.C. § 1691e(b) (1982) reads in pertinent part:

Any creditor . . . who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000, in addition to any actual damages . . . , except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$500,000 or 1 per centum of the net worth of the creditor.

73. 15 U.S.C. § 1691e(c) (1982) reads in pertinent part: "Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter."

74. 15 U.S.C. § 1691e(d) (1982) reads in pertinent part: "In the case of any successful action . . . the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under [this] subsection."

spouse sign personal guarantees. For purposes of the illustration, the spouse's guarantee is not necessary from a creditworthiness standpoint.⁷⁵

Under New Regulation B, the corporation, the owner, and the spouse could all qualify as applicants for purposes of a violation of the cosignature rules.⁷⁶ If marital discrimination is definitely present in this credit transaction, the question arises whether all the applicants now have a cause of action. If so, this common scenario could result in a windfall recovery. Specifically, even though a single violation occurred, nothing in the literal language of New Regulation B or the ECOA prevents all aggrieved applicants from recovering damages.⁷⁷

On the other hand, the Federal Reserve Board's explanation accompanying the proposed amendment to Regulation B provides some useful, albeit inconclusive, guidance. The Board recognized that if it became a matter of course for both the original applicant and the guarantor to claim injury from the same alleged violation, litigation expense could increase. However, the Board reasoned that the increase would probably be small because only one violation would be involved.⁷⁸ In its proposed draft of the amendment, the Board seemed to indicate inclusion of guarantors as applicants was not intended to precipitate multiple damage recoveries for a single violation. Unfortunately, that intent was not thereafter reflected in either the Board's introductory statements or official commentary accompanying the final adopted amendment to Regulation B,⁷⁹ leaving the Board's true intent open to either interpretation.

Therefore, the multiple recovery problem must be analyzed assuming the Federal Reserve Board intended to leave the issue open to judicial interpretation, which is its normal posture on remedies. At the outset, the corporation can probably be eliminated as an "aggrieved" applicant. The purpose of Regulation B is "to promote the availability of credit to all creditworthy applicants without regard to . . . marital status."⁸⁰ Therefore, the business' rights have not been violated within the meaning of Regulation B. However, the bank unnecessarily required the owner's spouse to sign a personal guarantee; therefore, the owner certainly has a cause of action. Likewise, the

75. This illustration is basically the *Delta Diversified* fact scenario, which is quite common in a business context. See *supra* notes 48-53 and accompanying text. See also Jacobs, *supra* note 4, at 344.

76. See *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Ass'n*, 595 F. Supp. 800, 808 (E.D. Pa. 1984). Just as the partnership was an applicant in *Hotel Rittenhouse*, the corporation would be an applicant in this case. In addition, the amendment to Regulation B intended to bring the owner and his wife within the protection of the Act.

77. See 15 U.S.C. § 1691e (1982), quoted *supra* at notes 71-74. Section 1691e does not couch the creditor's liability in terms of violations, but rather in terms of the "aggrieved applicant." Therefore, each aggrieved applicant could be considered separately. See also 12 C.F.R. § 202.14(b) (1986).

78. 50 Fed. Reg. 10,890, 10,896 (1985).

79. 50 Fed. Reg. 48,020, 48,027 (1985).

80. 12 C.F.R. § 202.1(b) (1986).

amendment intended to extend the Act's protection to guarantors; accordingly, the owner's spouse also has a cause of action.

Despite a single violation of the cosignature rules, under Regulation B this illustration will still produce two aggrieved applicants. Equitable or declaratory relief should not be a problem because the owner can be placed in the position he would have been in had there been no discrimination. Accordingly, the spouse's guarantee should be released. In this illustration, the same equitable relief would be granted whether the owner, the spouse, or both brought a cause of action against the creditor. On the other hand, that the owner and the spouse may both be entitled to compensatory and punitive damages may be problematic.

The ECOA simply states that a noncomplying creditor is liable to an aggrieved applicant for any damage sustained.⁸¹ Consequently, unless the Federal Reserve Board provides some indication of its intent or Congress amends the statute, a potential for multiple recoveries will exist because compensatory and punitive damages may be awarded to each aggrieved applicant.⁸² Moreover, actual damages are not limited to monetary losses. They include not only out-of-pocket losses but also injury to credit reputation, mental anguish, humiliation, and embarrassment.⁸³ Furthermore, punitive damages may be awarded even if actual damages are not established.⁸⁴ However, because of the inherent difference between actual and punitive damages, the propriety of multiple damage recoveries should be analyzed separately for each type of award.

With respect to actual damages, the personal nature of injuries resulting from credit discrimination creates an obvious potential for multiple recoveries. For example, a court may determine that both the owner's and the spouse's credit reputations suffered to the extent of the guarantee and award both a release of the guarantor and damages for injury to credit reputation equal to the amount of the guarantee.⁸⁵ This is exactly the result credit industry commentators feared might occur if protection were extended to guarantors.⁸⁶

81. See 15 U.S.C. § 1691e(a) (1982), quoted *supra* at note 71.

82. See *supra* note 77.

83. See *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982); *Sayers v. General Motors Accept. Corp.*, 522 F. Supp. 835, 841 (W.D. Mo. 1981); *Owens v. Magee Fin. Serv., Inc.*, 476 F. Supp. 758, 770 (E.D. La. 1979); *Shuman v. Standard Oil Co.*, 453 F. Supp. 1150, 1153-54 (N.D. Cal. 1978).

84. *Smith v. Lakeside Foods, Inc.*, 449 F. Supp. 171, 172 (N.D. Ill. 1978) ("even if [the] plaintiff is unable to prove any actual damages, she may be entitled to declaratory or injunctive relief, or punitive damages and costs").

85. This could conceivably occur because an appropriate nondamage remedy for the primary obligor would be release of the guarantor. On the other hand, the existence of the obligation on the guarantor's financial statement could be perceived to injure his credit reputation to the extent of the obligation. Hence, double recovery for one violation.

86. Letter responding to proposed amendment to Regulation B from the New York State Bankers' Association, August 31, 1976 ("To permit actions by guarantors would subject creditors to separate actions by two parties, including one who has suffered no economic

In reality, however, the creditors' fear of multiple damage recoveries was probably unwarranted. Injuries resulting from a discriminatory denial of credit do not lend themselves to a dollar formulation. In fact, the difficulty applicants have had proving they suffered actual damage has been criticized as one of the ECOA's primary weaknesses.⁸⁷ Because the ECOA provides no minimum statutory recovery,⁸⁸ an applicant takes a risk of no recovery if actual damages cannot be established.⁸⁹

Although the personal nature and difficulty of proving actual damages is not an answer to the multiple recovery problem, it may provide the basis for an answer. One of the arguments supporting expansion of the definition of applicant to include guarantors was that a broader-based applicant pool would enhance enforcement of Regulation B.⁹⁰ In that respect, when a creditor improperly requires a spousal guarantee, there are now two aggrieved applicants as opposed to one or even none under Old Regulation B. Because the damages suffered are personal in nature, arguably both applicants should be allowed to recover actual damages, even though only one violation has occurred.

This conclusion is consistent with both the language of the ECOA and the Federal Reserve Board's intent to extend ECOA protection to guarantors.⁹¹

harm."'). Although this letter was in response to the 1976 amendment to Regulation B (see *supra* notes 21 and 22), the proposed change to the regulation was identical.

87. Matheson, *The Equal Credit Opportunity Act: A Functional Failure*, 21 HARV. J. ON LEGIS. 371, 378 (1984). The speculative nature of damages emphasizes the need for a minimum statutory recovery. Congress recognized the same problem in Truth-in-Lending and, therefore, established a minimum recovery of \$1,000 plus court costs, legal fees, and actual damages for a number of specific violations. The \$1,000 statutory minimum recovery produced 14,000 cases in ten years so Congress amended the Truth-in-Lending Act to reduce the amount to \$100. See 15 U.S.C. § 1640 (1982).

88. See 15 U.S.C. § 1691e(a), *supra* note 71.

89. *But see* Anderson v. United Fin. Co., 666 F.2d 1274, 1278 (9th Cir. 1982); Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1029 (N.D. Ga. 1980). The court will not presume any injury; the actual damages must be specifically proven.

However, other consumer credit legislation has not followed the same viewpoint, which may indicate that courts may adopt a more liberal attitude toward ECOA damages in the future. For example, under the Fair Credit Reporting Act, a lender or credit reporting agency is liable for any actual damage sustained by the consumer as a result of the willful noncompliance with the Act's requirements. 15 U.S.C. § 1681n(1) (1982). Courts have held that actual damages are not required to be proved in an action to enforce liability under section 1681n. See Bryant v. TRW, Inc., 689 F.2d 72, 80 (6th Cir. 1982) (award of \$8,000 actual damages for embarrassment and humiliation as a result of a reporting agency's furnishing an inaccurate mortgage report was not excessive); Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509, 513 (5th Cir. 1982) (humiliation and mental distress are recoverable elements of damages under the FCRA, notwithstanding the absence of out-of-pocket damages); Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 661 (D. Wyo. 1974) (the tortious nature of a violation of the FCRA does not require actual damages to be proved but only that they not be speculative). *But cf.* Swoager v. Credit Bureau of Greater St. Petersburg, 608 F. Supp. 972, 977 (M.D. Fla. 1985) (under the CCRA damages for humiliation and mental distress must be proved to be recovered).

90. See Memorandum, *supra* note 30.

91. See 15 U.S.C. § 1691e(a) (1982), *supra* note 71. See also *supra* notes 65-78 and accompanying text.

Because of the personal nature of each applicant's injuries, limiting actual damages to a single recovery for each violation would be unfair. If both aggrieved applicants can prove damage to their credit reputations, both should recover. Given the difficulties inherent in proving damage to credit reputation, recovery by both applicants is unlikely in practice. Nevertheless, the Federal Reserve Board intended to extend ECOA protection to both the original applicant and the guarantor.⁹² To automatically limit recovery in this instance would frustrate that intent.

In contrast, punitive damages present an entirely different problem because they are not personal in nature. They are not designed to compensate an applicant, but rather to penalize the creditor for wanton, malicious, or oppressive conduct in the credit transaction.⁹³ Consequently, although the court must consider the number of persons adversely affected by the creditor's conduct,⁹⁴ the penalty actually relates to the transaction rather than the applicant.

Moreover, punitive damages are specifically limited by the ECOA;⁹⁵ arguably, awarding separate punitive damages to each applicant could exceed the statutory limit. Loopholes allowing multiple punitive damage recoveries for a single violation are not a new concept to credit legislation. A similar problem existed with respect to the Truth-in-Lending Act,⁹⁶ and its resolution may provide analogous guidance in this case. Like the ECOA, Truth-in-Lending allows a civil penalty that may be awarded in addition to any actual damages incurred. After a number of courts awarded separate penalties to multiple plaintiffs,⁹⁷ Congress amended the Truth-in-Lending Act to clarify its original intent with respect to civil penalties.⁹⁸ Currently, when there are multiple obligors in a consumer credit transaction, only one civil penalty may be awarded for each violation, which must be split among the multiple obligors.⁹⁹

92. See *supra* notes 65-78 and accompanying text.

93. See *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982); *Shuman v. Standard Oil Co.*, 453 F. Supp. 1150, 1155 (N.D. Cal. 1978). Punitive damages may also be awarded if the creditor acts in reckless disregard of the requirements of the law, even though there was no specific intent to discriminate on unlawful grounds.

94. See 15 U.S.C. § 1691e(b) (1982), *supra* note 72. Other factors the court must consider include: the amount of actual damages awarded, the frequency and persistence of failures of compliance, the resources of the creditor, and the extent to which the failure of compliance was intentional.

95. See *id.* See also SENATE REPORT, *supra* note 3, and *infra* notes 100-101 and accompanying text.

96. 15 U.S.C. §§ 1601-65 (1982).

97. Compare *Allen v. Beneficial Fin.*, 531 F.2d 797 (7th Cir. 1976) with *Powers v. Sims & Levin*, 542 F.2d 1216 (4th Cir. 1976).

98. 15 U.S.C. § 1640(d) (1982) reads as amended: "When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of [the statutory civil penalty] . . . for a violation of this title."

99. See *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 616 (7th Cir. 1982) (the court interpreted the amendment to require a single recovery of the \$1,000 civil penalty for each violation, awarded jointly to the plaintiffs in the case).

The congressional intent to limit punitive damages in Truth-in-Lending may infer a similar intent with respect to other consumer credit protection legislation, including the ECOA. This conclusion is supported by the legislative history of the ECOA. Congress recognized the relationship between the ECOA and Truth-in-Lending and attempted to set limits on punitive damages that were more effective, yet consistent, with those in Truth-in-Lending.¹⁰⁰ Moreover, Congress balanced the interests of the creditor against those of effective enforcement to select the specific limitation amounts, apparently without anticipating more than one applicant in an individual action.¹⁰¹ Consequently that balance would not be meaningful unless punitive damages were awarded on a transaction basis.

In short, the intent of Congress and the Federal Reserve Board would be best served if courts will adopt a hybrid approach to damage awards. Aggrieved applicants should be allowed to recover all actual damages suffered without limitation. However, punitive damages should be limited to one recovery for each violation. A hybrid approach is preferable for two reasons. First, it would accomplish the Federal Reserve Board's intent by extending protection to guarantors. At the same time, creditors' fears of multiple recoveries would be quelled by the general difficulty of proving actual damages under Regulation B. Second, by limiting punitive damages, it would preserve the consistency with other credit legislation which Congress intended.

Section 1-109: An Ignored Potential Source of Relief

Creditors must generally comply with both the ECOA and any applicable state law.¹⁰² After passage of the ECOA, a number of states added credit discrimination laws. The question arises whether these state statutes complicate the ECOA remedy analysis. In 1974, Oklahoma added section 1-109 to its Consumer Credit Code (Code),¹⁰³ which prohibits limitations on or

100. See SENATE REPORT, *supra* note 3, at 415-16. The committee considered effectiveness of the punitive damage ceilings used in Truth-in-Lending for individual and class actions in order to rationalize the ceilings set for the ECOA. Moreover, the committee described the two acts as "parallel" with respect to punitive damages.

101. *Id.* The committee sought to set the punitive damage limits at a point that would be a "workable structure" for creditors, yet be a "significant deterrent" at the same time.

102. Under 15 U.S.C. § 1691d(f) (1982), the Act does not exempt any person from complying with any state law, except to the extent the state law is inconsistent with the Act, and then only to the extent of the inconsistency. The Board is authorized to determine whether any inconsistencies exist; however, it may not determine that a more protective state law is inconsistent.

103. The Oklahoma Consumer Credit Code is found in title 14A of the Oklahoma Statutes [hereinafter Code]. Oklahoma's antidiscrimination statute is 14A OKLA. STAT. § 1-109 (1981) which reads:

(1) With respect to "Consumer Credit Sale", "Consumer Lease", or "Consumer Loan", no creditor shall limit or refuse to extend credit solely on the basis of the sex or marital status of the consumer.

(2) The provisions of this section shall be enforced by the Administrator of the Department of Consumer Credit in accordance with his statutory powers and duties.

refusals to extend credit solely on the basis of sex or marital status. It applies both to consumer credit transactions and to consumer leases. Even though guarantors are no more expressly covered in section 1-109 than in the federal Act, the statute would seem to be both applicable to the guarantor situation and broad enough to cover it.

Section 1-109 provides that it shall be enforced by the Administrator of Consumer Affairs through his statutory powers and duties.¹⁰⁴ The Administrator heads the Department of Consumer Credit, which is the state agency responsible for enforcement of the Code. He is granted general enforcement powers by the Code as well as specific powers in certain statutes.¹⁰⁵ By vesting enforcement power in the Administrator, section 1-109 has been interpreted to preclude any private right of action.¹⁰⁶ Nevertheless, the legislature would not have passed such a statute without intending it to be a potential source of relief from credit discrimination. Determining what relief the statute may provide requires a two-step analysis. First, one must consider to what extent, if any, the Oklahoma statute is preempted by federal law. Second, only after the Oklahoma statute is determined not to be preempted may one consider the methods of enforcement available.

The ECOA preempts a state law only to the extent of an inconsistency with the Act.¹⁰⁷ Regulation B enumerates five characteristics that, if present in a state law, are deemed to be inconsistent.¹⁰⁸ The thrust of the regulation is to preempt state laws that prohibit conduct specifically required for debtor protection under Regulation B. Although the Oklahoma statute is considerably narrower than the ECOA, it is not inconsistent and, thus, not preempted.

Although enforcement of the Oklahoma statute is not preempted by the ECOA, it has not been used as an effective tool in its thirteen years of existence. Since its enactment, the statute has yet to be cited in a published judicial opinion. Oklahoma consumers have made a serious oversight in ignoring the statute. Indeed, a debtor's strongest resource against discrimination may lie in the broad enforcement powers granted the Administrator of

104. See 14A OKLA. STAT. § 1-109(2) (1981), *supra* note 103. See also *id.* § 6-103 ("Administrator" means Administrator of Consumer Affairs.).

105. The Administrator's general powers are set forth in article VI of title 14A. See generally 14A OKLA. STAT. §§ 6-104 through 113 (1981). Those powers include receiving and acting on complaints, counseling persons as to their rights and duties under the Consumer Credit Code, establishing consumer education programs, making studies, and adopting rules for administration of the Department of Consumer Credit and the Consumer Credit Code. *Id.* § 6-104. Moreover, the Administrator has general authority to administratively enforce the Consumer Credit Code. *Id.* § 6-105.

106. *Id.* § 1-109 (Comment by Bryce A. Baggett and Fred H. Miller).

107. See 15 U.S.C. § 1691d(f) (1982), *supra* note 102.

108. A state law is deemed inconsistent if it: (1) requires or permits a practice that is inconsistent with the Act; (2) prohibits extensions of individual credit to creditworthy married applicants; (3) prohibits inquiries or data collection required to comply with the Act; (4) prohibits considering age as an element of creditworthiness, based on a statistically sound credit scoring system; or (5) prohibits inquiries necessary to establish or administer a special purpose credit program. 12 C.F.R. § 202.11(b) (1986).

Consumer Affairs.¹⁰⁹ For example, the Administrator may bring a civil action to restrain a creditor from violating the Consumer Credit Code and for other appropriate relief.¹¹⁰ The question arises whether “other appropriate relief” may be construed to include equitable and compensatory relief on behalf of an aggrieved consumer. Although the Code gives no specific guidance on this matter, the ECOA administrative enforcement provisions may provide analogous guidance for state law.

Under the ECOA, several federal agencies and the Attorney General are empowered to enforce the Act and bring civil actions for violations of its provisions.¹¹¹ In particular, the Federal Trade Commission is given overall authority to enforce compliance with the ECOA, using all of its statutory functions and powers.¹¹² In the Federal Trade Commission context, the phrase “other appropriate relief” includes at least equitable relief and possibly monetary damages.¹¹³ Considering the broad powers granted the Administrator, it would be reasonable to anticipate that Oklahoma courts would construe the Oklahoma Code as liberally as the federal courts have construed the ECOA.¹¹⁴

Besides the equitable powers available under section 6-110, the Administrator may also bring a civil action against a creditor for making or collecting charges in excess of those permitted under the Consumer Credit Code.¹¹⁵ Moreover, the action may relate to credit transactions involving more than one debtor, making the power broad enough to include the guarantor situation.¹¹⁶ If an excess charge has been made, the creditor must refund the

109. See 14A OKLA. STAT. §§ 6-104 through 113 (1981).

110. *Id.* § 6-110.

111. 15 U.S.C. § 1691c(c) (1982). Twelve agencies are given enforcement powers using their statutory powers. Moreover, under section 1691e(h), the Attorney General may bring a civil action for such relief as may be appropriate, including injunctive relief.

112. *Id.* § 1691c(c).

113. See *United States v. Beneficial Corp.*, 492 F. Supp. 682, 687-88 (D.N.J. 1980), *aff'd without opinion*, 673 F.2d 1302 (3d Cir. 1981). With respect to the Attorney General, “appropriate relief” authorizes suits on behalf of consumers for equitable relief, but not fines or consumer redress. See also *United States v. Landmark Fin. Serv., Inc.*, 612 F. Supp. 623, 631 (D. Md. 1985). In light of the Federal Trade Commission’s broad enforcement powers under the Act, it may bring suits on behalf of consumers seeking equitable relief, civil penalties, and consumer redress.

114. See Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO ST. L.J. 624, 646-47 (1968). In an early article interpreting the Uniform Consumer Credit Code, the author indicated that the Administrator faces two hurdles in seeking to use the phrase “other appropriate relief” to obtain redress for individual consumers. First, a court must ascertain the intended meaning of the phrase. Second, a court must determine if the Administrator has standing to represent aggrieved consumers. The author reasoned that redress under this phrase seems more plausible where the violation concerns the inclusion of void clauses and the court is asked to enjoin the creditor from enforcing them. Thus, the relief sought is injunctive; the state is sometimes allowed to seek injunctive relief when representing private rights of action. The phrase probably does not extend to recovery of monetary damages.

115. 14A OKLA. STAT. § 6-113(1) (1981).

116. *Id.*

amount of the excess charge to the debtor.¹¹⁷ Enforcing an improper spousal guarantee could certainly be construed as making or collecting an excess charge.

In the guarantor context, the statute would clearly allow equitable relief because the statutory language allows relief for making improper charges. Moreover, the statute would arguably allow monetary damages as well. It prohibits "collecting" excess charges. Therefore, it appears the debtor could recover the amount of the guarantee where the creditor had collected it. Consequently, it seems the debtor at least has a source of equitable, and possibly monetary, relief in the Administrator of Consumer Affairs.

In addition, the court may award a penalty of up to \$5,000 in a civil action brought by the Administrator.¹¹⁸ To award this penalty, the court must find the creditor engaged in a course of repeated and willful violations of the Consumer Credit Code.¹¹⁹ However, a strong criticism of the ECOA is the difficulty in proving the conduct necessary for punitive damages.¹²⁰ To support an award of punitive damages, the creditor must wantonly, maliciously, or oppressively discriminate against an applicant.¹²¹ Presumably, recovering the civil penalty under Oklahoma law would meet with the same difficult barrier.

Besides the compensatory and punitive relief available in an action brought by the Administrator, an aggrieved applicant may combine the benefits of the Oklahoma and federal laws in a single action. Under the ECOA an aggrieved applicant may bring a legal action to recover monetary damages under the Act or state law, but not both.¹²² However, this election of remedies does not include administrative actions.¹²³ Moreover, it is clear from the legislative history of the ECOA that an administrative action, excluded from the election of remedies provision, includes both federal and state administrative actions.¹²⁴ By statute, a civil action brought by the Administrator on behalf of the consumer constitutes an administrative action

117. *Id.*

118. *Id.* § 6-113(2).

119. *Id.*

120. See discussion of damages, *supra* notes 83 and 88.

121. 15 U.S.C. § 1691e(e) (1982) reads in pertinent part: "No provision of this subtitle imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board." See also *supra* note 93.

122. 15 U.S.C. § 1691d(e) (1982).

123. *Id.* The election neither applies to court actions in which the relief sought does not include monetary damages nor to administrative actions.

124. See SENATE REPORT, *supra* note 3, at 414.

[A]n applicant is free to pursue administrative, injunctive or declaratory relief under either federal or state law without being forced to make an election of remedies. Thus, an aggrieved applicant may utilize any conciliation services available under state law without foregoing his or her right to seek monetary damages separately. Or that applicant might seek a declaratory judgment in federal court without losing any available claim to monetary damages under state law.

under the Code.¹²⁵ Therefore, the Administrator may bring a civil action on behalf of an aggrieved applicant for compensatory and punitive relief without preventing an individual action by the aggrieved applicant under the ECOA.

Although a guarantor may combine the Oklahoma and federal remedies in a single action, this should not create a double recovery problem. Under the Oklahoma Code, individual recovery through the Administrator is limited to release from the guarantee or return of improperly collected funds, only equitable and restitutionary remedies. Consequently, there should be no overlap of compensatory damages in a combined action. There is a possibility that a guarantor might recover punitive damages under both federal and state law for the same violation. However, considering the general difficulty of proving the conduct necessary for an award of punitive damages, that result is unlikely.

Finally, although the Administrator of Consumer Affairs is statutorily empowered to enforce section 1-109, nothing in the statutory language specifically precludes private enforcement.¹²⁶ Improperly requiring a spousal guarantee results in a statutory violation with no stated private remedy. The critical issue is whether the language "shall be enforced by the Administrator" precludes implying a private cause of action. An early version of the bill adding section 1-109 to the Oklahoma Code provided for enforcement by the Administrator and "all other remedies provided by the Act." The bill was revised in committee to exclude the latter language,¹²⁷ indicating that the legislature in fact intended to preclude a private action. Even if the Oklahoma statute may not be asserted affirmatively for damages, the question remains whether it could be raised as a defense to payment of an obligation. The issue has never been raised in a judicial proceeding; therefore, the question must remain open.

The Consumer Credit Code appears to support the conclusion that an aggrieved applicant is not precluded from raising the Oklahoma antidiscrimination statute as a defense to liability when sued on a guarantee. Section 1-109 provides that the Administrator shall enforce the provisions of the statutes in accordance with his statutory powers.¹²⁸ Those powers are set forth in article VI of the Consumer Credit Code.¹²⁹ However, section 6-115 specifically states that the grant of powers to the Administrator in article VI does not af-

125. 14A OKLA. STAT. § 6-107 (1981).

126. See *id.* § 1-109(2), *supra* note 103.

127. Pursuant to an examination of the various drafts of House Bill 1507 at the Oklahoma State Archives, the language that became subsection (2) of section 1-109 was amended by the Committee on Banks and Banking on April 4, 1974, to read: "In addition to all other remedies provided by the Act, the provisions of this section shall be enforced by the Administrator of Consumer Affairs in accordance with his statutory powers and duties." On April 15, 1974, the Committee revised the language to its current form. See section 1-109(2), quoted *supra* note 103.

128. See *id.*

129. See *supra* note 101.

fect remedies available to debtors under the Consumer Credit Code or "other principles of law or equity."¹³⁰

Section 1-109 prohibits limitations on credit solely on the basis of marital status. Therefore, improperly requiring a spousal guarantee violates a specific Oklahoma statute.¹³¹ Under general equitable principles, the guarantor should be allowed to raise violation of that statute as a defense to liability on the guarantee. Raising the statute as a defense to liability on an obligation is inherently different from using it affirmatively for damages. Notwithstanding legislative intent to vest sole enforcement authority in the Administrator, a creditor should not be allowed to collect a personal guarantee which was obtained in clear violation of state and federal law.

Conclusion

Automatically requiring an applicant's spouse to cosign debt instruments as a guarantor was one of the common practices precipitating passage of the ECOA. As a result, the Regulation B cosignature rules have always specifically prohibited this practice. However, only aggrieved applicants may bring a private action under the ECOA, and Old Regulation B specifically excluded guarantors from the definition of "applicant." Consequently, if a creditor violated Regulation B by improperly requiring a spousal guarantee, the guarantor was not eligible to sue or raise the violation of Regulation B as a defense to liability. Critics perceived this as a misinterpretation of the rules and a serious weakness in the ECOA enforcement chain.

Despite this criticism, when an applicant's spouse was required to sign a guarantee, the Old Regulation B definition of "applicant" made perfect sense in terms of the intended purpose of the ECOA. Congress intended that no credit applicant be denied individual credit on any basis other than credit-worthiness. Although the guarantor spouse became obligated on the note, he or she was never denied individual credit based on marital status.

On the other hand, in a business credit context, the criticism had substantial merit. It has traditionally been a common practice for banks to require the personal guarantees of stockholders of small business borrowers. If the bank improperly required the stockholder's spouse to sign as well, there was no remedy under Old Regulation B because both the stockholder and the spouse were guarantors, excluded from the definition of "applicant."

In 1985, Regulation B was amended to include guarantors within the definition of "applicant" for purposes of the cosignature rules. Thus, the critics' concerns were quelled with respect to the standing to sue problem. However, the amendment to Regulation B is not a panacea for all the problems of the cosignature rules. It will have no impact on the *Meadors* problem. In certain circumstances involving closely held businesses, when a stockholder is required to sign a personal guarantee of corporate debt, the stockholder's spouse may perceive a duty or compulsion to sign as well. In

130. 14A OKLA. STAT. § 6-115 (1981).

131. *Id.* § 1-109(1).